Tony Pua Kiam Wee v Dato' Sri Mohd Najib bin Tun Haji Abdul Razak

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-1619–08 OF 2018
HAMID SULTAN, HANIPAH FARIKULLAH AND LAU BEE LAN JJCA
15 OCTOBER 2019

Civil Procedure — Discontinuance — Defamation — Plaintiff in his defamation suit obtained interlocutory injunction preventing defendant from uttering/publishing further statements defamatory of him — While defendant's appeal process to Federal Court against granting of injunction was afoot, plaintiff applied to withdraw suit — High Court struck out suit with costs — Whether High Court should properly have dismissed (and not struck out) the suit with costs, set aside the interlocutory injunction and ordered damages to be assessed — Whether although plaintiff had right to withdraw his action subject to payment of costs and damages, if any, the court should vacate any interim order obtained in the suit and where relevant order damages to be assessed

The respondent had sued the appellant for defamation and had obtained an interlocutory injunction restraining the appellant from uttering or publishing further statements that were defamatory of him. The grant of the injunction was affirmed by the Court of Appeal ('COA'). After the appellant had obtained leave from the Federal Court to appeal against the COA's decision, the respondent applied to withdraw his defamation suit. Despite the appellant's objection to the withdrawal on the ground that the case had reached an 'advanced stage' and that he would be prejudiced by the withdrawal, the High Court struck out the suit with costs. In the instant appeal, the appellant submitted that the withdrawal of the suit should not have been allowed before the Federal Court had decided the appeal in which important issues of law had been raised; that, at most, the High Court should have stayed the proceedings pending the outcome of the appeal. The appellant argued that he had been prejudiced by the withdrawal of the suit because the respondent had, without a trial, 'secured a benefit' by obtaining the interlocutory injunction which had curtailed his constitutional right to free speech and prevented him from commenting on matters of public interest as a Member of Parliament and a member of its Public Accounts Committee.

Held, unanimously allowing the appeal and substituting the High Court's order with an order that the respondent's action be dismissed with costs and the interlocutory injunction be set aside with an order for damages to be assessed:

(1) In the instant case, the High Court judge had only allowed the withdrawal with costs without setting aside the interlocutory injunction (see para 9).

(2) An interlocutory injunction would normally be granted subject to an undertaking as to damages. When a plaintiff withdrew a suit after having obtained an interlocutory injunction, it could not be on the basis of payment of costs alone. There also had to be an order setting aside the interlocutory orders and an order for assessment of damages. Further, a case withdrawn after some judicial orders had been made warranted the matter to be dismissed as opposed to being struck out unless the action had become academic (see para 8).

(3) It was trite that a plaintiff generally had the right to withdraw his action subject to payment of costs and damages, if any, with a small window for the court to direct the matter to proceed and hear the defendant's evidence. Once the main suit was withdrawn, all other applications and interlocutory orders would collapse. However, the vacating of any interim order should be through an order of court and, where relevant, the court must order an inquiry as to damages when there was a specific undertaking as to damages. On the facts of the instant case, it was not appropriate to order the proceedings to be stayed purely on the ground that an appeal was pending before the Federal Court (see para 13).

[Bahasa Malaysia summary

Responden telah mengemukakan satu saman fitnah terhadap perayu dan telah memperoleh satu injunksi interlukotori menghalang perayu dari mengemuakkan atau menerbitkan pengataan lanjut yang memfitnahnya. Pemberiaan injunksi tersebut telah dikekalkan oleh Mahkamah Rayuan ('MR'). Selepas perayu telah mendapat izin dari Mahkamah Persekutuan untuk merayu terhadap keputusan MR, responden memohon untuk menarik balik saman fitnahnya. Meskipun bantahan perayu terhadap tindakan menarik balik kes tersebut atas alasan bahawa kes tersebut telah sampai ketahap yang lanjut dan dia akan terprejudis dengan tindakan menarik balik tersebut, mahkamah tinggi telah membatalkan guaman tersebut dengan kos. Dalam rayuan ini, perayu menghujahkan bahawa tindakan menarik balik guaman tersebut tidak sepatutnya dibenarkan sebelum mahkamah persekutuan memutuskan rayuan tersebut yang mana isu undang-undang penting telah dibangkitkan; dan di tahap tertinggi sekalipun, mahkamah tinggi sepatutnya memberikan penagguhan prosiding menantikan keputusan rayuan. Perayu menghujahkan bhawa dia telah diprejudiskan oleh tindakan menarik balik guaman tersebut kerana responden telah, tanpa perbicaraan, mendapatkan kepentingan dengan mendapatkan injunksi interlokutori yang menghalang hak perlembagaan bebas beliau untuk kebebasan bersuara dan menghalangnya daripada membuat komen atas perkara berkepentingan awam sebagai ahli parlimen dan ahli Jawatankuasa Akaun Awam ('JAA').

Diputuskan, secara sebulat suara membenarkan rayuan dan menggantikan perintah mahkamah tinggi dengan perintah bahawa tindakan responden diketepikan dengna kos dan injunksi interlukotori diketepikan dengan kerugian untuk ditaksirkan:

(1) Dalam kes ini, hakim Mahkamah Tinggi hanya membenarkan tindakan menarik balik dengan kos tanpa mengetepikan injunksi interlukotori (lihat perenggan 9).

(2) Satu injunksi interlukotori akan kebiasaannya dibenarkan tertakluk kepada satu akujanji berkenaan dengan ganti rugi. Apabila plaintif menarik balik satu guaman selepas mendapat satu injunksi interlukotori, ianya tidak boleh berasaskan pembayaran kos sahaja. Perlu juga ada satu perintah untuk mengetepikan perintah interlukotori dan perintah untuk penaksiran ganti rugi. Lanjutan itu, satu kes ditarik balik selepas beberapa perintah kehakiman telah diberi memerlukan perkara tersebut diketepikan dan bukannya dibatalkan kecuali tindakan tersebut telah menjadi akademik (lihat perenggan 8).

(3) Adalah merupakan undang-undang mantap bahawa plaintif secara amnya mempunya hak untuk menarik balik tindakkannya tertaklum kepada pembayaran kos dan ganti rugi, sekiranya ada, dengan satu tempoh yang singkat untuk mahkamah mengarahkan perkara tersebut diteruskan dan mendengar keterangan defendan. Apabila guaman utama ditarik balik, semua permohonan lain dan perintah interlukotori akan terbatal. Namun, membatalkan apa-apa perintah interim harus dilakukan melalui perintah mahkamah, dan, apabila relevan, mahkamah harus memerintahkan satu inkuiri berkenaan dengan ganti rugi apabila wujud aku janji spesifik berkenaan dengan ganti rugi. Atas fakta kes, ianya bukanlah satu perintah yang sesuai untuk prosiding ditangguhkan hanya atas alasan satu rayuan menantikan pendengaran dihadapan Mahkamah Persekutuan (lihat perenggan 13).]

Cases referred to

Castanho v Brown & Root (UK) Ltd and another [1981] 1 All ER 143, HL (refd)

Christie v Christie (1873) LR 8 Ch App 499, CA (refd)

Covell Matthews & Partners v French Wools Ltd [1977] 1 WLR 876, ChD (refd)

Kenanga Investment Bank Bhd v Swee Joo Bhd & Ors and another appeal [2017] MLJU 2095; [2017] 1 LNS 2086, CA (refd)

Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan [2002] 3 MLJ 155, CA (refd)

Pegawai Pengurus Pilihanraya Dewan Perayu Undangan Negeri Bagi Pilihan Raya Dun N27 Amino Agos bin Suyub v Dr Streram a/l Sinnasamy & Ors [2019] MLJU 1558; [2019] 1 LNS 589, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69
Evidence Act 1950
Federal Constitution art 10

Appeal from: Suit No WA-23CY-17–04 of 2017 (High Court, Kuala Lumpur)

Surendra Ananth (Tan Cheng Leong with him) (KP Lu & Tan) for the appellant.
Mohd Hafarizam Harun (Norhazira bt Abu Haiyan with him) (Hafarizam Wan & Aisha Mubarak) for the respondent.

Hamid Sultan JCA:

[1] The appellant appealed against the decision of the learned High Court judge who allowed the appellant's application to withdraw his defamation suit notwithstanding:

(a) the High Court had granted an interlocutory injunction to restrain the appellant from streaming a Facebook clip of his speech which the respondent claimed was defamatory;

(b) on appeal to the Court of Appeal, the Court of Appeal affirmed the interlocutory injunction; and

(c) the appellant is awaiting an appeal process in the Federal Court on the issue of the interlocutory injunction.

[2] The central contention of the appellant before us was that the respondent ought not to have been allowed to withdraw the suit without the Federal Court deciding on the appellant's appeal and at the most the High Court should have only stayed the proceedings and the prospective orders pending the outcome of the Federal Court's decision. The learned counsel for the appellant's submission on these points, inter alia, in verbatim read as follows:

1.1. At the time the Statement of Claim was filed, the Respondent was the Prime Minister of Malaysia.

1.2. The Appellant was the Member of Parliament for Petaling Jaya Utara and had been a member of the Public Accounts Committee, a standing committee of the Dewan Rakyat. He was also a member of the Central Executive Committee of the Democratic Action Party.

1.3. The Respondent sued the Appellant for defamation in relation to certain statements made by the Appellant in the Parliament building which concerns the interest of the public. The Respondent obtained an injunction in the High Court to restrain the Appellant from uttering or publishing such statements or similar statements. The

Court of Appeal upheld the said injunction. The Federal Court granted leave to the Appellant to appeal against the Court of Appeal decision. This will be explained below.

1.4. It was only after the Appellant had obtained leave from the Federal Court that the Respondent had applied to discontinue his claim.

2. In essence, it is the Appellant's position that discontinuing the proceedings at this stage would be greatly prejudicial to the Appellant as the Respondent had secured a benefit by obtaining the injunction against the Appellant. For clarity, it is not the Appellant's position that the Respondent should be compelled to prosecute his claim. The Appellant's position is that the proceedings should only be discontinued upon the disposal of the Appellant's appeal against the injunction in the Federal Court.

[3] The learned counsel for the respondent had specifically set out the incriminating facts and circumstances which led to the interlocutory injunction. That part of the submission read as follows:

7. The Appellant is a member and the National Publicity Secretary of the Democratic Action Party ('DAP') and the Member of Parliament for the Constituency of Petaling Jaya Utara.

8. On 06.04.2016, the Appellant had made a statement at the foyer of the Parliament Building whereby this fact has been admitted by the Respondent.

9. On 06.04.2017, the Appellant had caused to be published through the Appellant's Facebook page at *https://www.facebook.com/MPTonyPua? fref=ts* a live video under the caption 'After debating a new Tourism tax bill which was passed by the BN MPs at 5am this morning, the Govt abandoned 5 other key bills which were tabled for debate. This is purely to allow for PAS President Dato' Seri Hadi Awang to table his private member's bill to amend RUU355 Syariah Courts (Criminal Jurisdiction) Act.

Opposition motions and bills have never made it to the House Floor for debate in the history of Malaysian Parliament, because BN controls what gets tabled, in collusion with the House Speaker. The question then must be asked, why did BN — that's UMNO, MCA, MIC, Gerakan and the Sabah- Sarawak parties — bend over backwards to give precedence to the PAS private member's bill? What more, PAS only has 14 MPs in the House, out of 222 in total — compared to Pakatan Harapan with more than 70 MPs — why is BN making PAS so 'powerful'? It is clear that UMNO is allowing the PAS motion for political reasons to divide the opposition support, while MCA, Gerakan, MIC and other BN component parties are mere self-serving eunuchs in BN's decision-making process'. ('the said Live Video').

10. The said Live Video was published by the Appellant contained, inter alia, the following words which the Respondent claimed to be false and/or malicious and defamatory of Respondent:

'... there will be no more debates on any other laws on Parliament until August this year. So for the next five months, there will be no new bills passed, and all these five

important bills, Government Bills, are actually postponed, just for what? Just to allow Marang to table the Private Members Bill. So this question must be answered by the Prime Minister, must be answered by the component parties of Barisan Nasional. There is no point saying that the Government is not tabling the Bill, when they actually grant precedence under the instructions of the Cabinet to allow for PAS with only 14 MPs in the Parliament. 14 out of 222 given the right to table this Bill. Even DAP has more MPs, we have 38 MPs ... 26 today, then ... aaa ... PKR has 30 ... 28 MPs. All of us have more MPs in the House, we are not allowed to table our Private Member's Bill or Motions, but PAS with only 14 MPs, is allowed to table their Bills. *So there is a clear cut collusion between Dato' Sri Najib Razak, between BN and PAS, with the political intent of splitting the Malay to vote among the opposition and with the political intent to keep hanging onto power despite the fact that he is the most unpopular Prime Minister in the history of Malaysia.* And we can see that the entire hoo-haa ... brouhaha ... was actually designed as a political scheme *to distract Malaysians from the crimes that the Prime Minister has committed mainly the fact that the Prime Minister has stolen billions of Ringgit from 1MDB*, a wholly own subsidiary of the Government of Malaysia. So we must not fall into the trap put forward by the Prime Minister in collusion with PAS. Malaysia must hold firmly strong. We will, on the part of DAP, reject the Private Member's Bill brought forwards (sic) by Marang, but the bigger agenda, the woods that *we should not lose sight of is to bring down a kleptocratic administration led by the biggest thief of all in the country, Dato' Sri Najib Razak.*

('the said impugned words')

11. The said impugned words were published via a Facebook site which is accessible to everyone who opened the site as admitted by the Appellant. The extent of circulation via the internet is enormous. As of 10.4.2017, (date before the serving of the Letter of Demand by the Respondent), the said recording has been viewed 82,434 times on the Appellant's Facebook page while there are 310,256 Facebook users following the Appellant's Facebook page.

12. The effect in publication via the internet has a tremendous multiplying effect. There is no knowing the fact that it was downloaded and circulated to others. The circulation is not only confined to within the country but also to the worlds (sic) outside.

[4] It is important to note that an interlocutory injunction to restrain the circulation or publication of purported defamatory material which has direct nexus to the public and freedom of speech under art 10 of the Federal Constitution is rarely given unless the language used is grossly scandalous and not related to the truth or falsity of the statement. What is considered to be grossly scandalous statements was explained in an unanimous decision of the Court of Appeal in the case of *Pegawai Pengurus Pilihanraya Dewan Perayu Undangan Negeri Bagi Pilihan Raya Dun N27 Amino Agos bin Suyub v Dr Streram a/l Sinnasamy & Ors* [2019] MLJU 1558; [2019] 1 LNS 589. That case makes reference to the UK Law Commission Report 2012 where a passage by Dr Venkat Iyer was cited for the proposition which we produced below:

(1) In *Wong Yeung Ng v Secretary of Justice* a newspaper was held guilty of contempt for describing some judges as 'dogs and bitches', 'scumbags', 'public enemy of freedom of the press and a public calamity to the six million citizens of Hong Kong', 'British white ghosts' and 'pigs', and threatening to 'wipe [them] all out'.

(2) In a then unreported case in South Australia, a radio presenter discussing a story about a magistrate invited his listeners to 'smash the judge's face in'.

(See 'The Media and Scandalising: Time for a Fresh Look' (2009) 60 Northern Ireland Legal Quarterly 245).

[5] 'Scandalous' generally refers to matters which improperly causes a derogatory light on someone, usually a party to the action, with respect to moral character or uses repulsive language. In *Christie v Christie* (1873) LR 8 Ch App 499, Lord Selborne made the following observations:

> The sole question is whether the matter alleged to be scandalous [w]ould be admissible in evidence to show the truth of any allegation in the [p]leading which is material with reference to the relief prayed.

[6] Thus, the threshold of scandalous statement is extremely high in contrast to that of defamation. In defamation, the version of the defendant may be true or untrue. However, when the allegation is said to be scandalous, it must be of severe nature, inter alia, as stated in the two examples cited by Dr Venkat Iyer to meet the threshold for injunction under the jurisprudence related to defamation read with art 10 of the Federal Constitution. It must be emphasised here that when the jurisprudence of defamation was developed in England, similar jurisprudence related to art 10 of the Federal Constitution was not in vogue in England.

[7] Thus, the threshold to seek an injunction for defamation when art 10 of the Federal Constitution is involved with regard to any statement intended in matters related to public interest is extremely high. Words such as criminal, thief, kleptocrat, political rowdy, etc against politicians or person holding public office in many places in the commonwealth countries where corruption index is high will not meet with the threshold to obtain an interlocutory injunction when a cause of action is mounted on defamation. However, if such words are used against private person where the public interest is not involved, the court may grant an injunction but usually it will be slow in granting an injunction as defamation suit is related to compensation for damage to reputation and truth is a complete defence. The court need to weigh the affidavit evidence as the justice of the case may demand.

[8] In addition, when an interlocutory injunction is granted, it will be done so with an undertaking as to damages. When a plaintiff withdraws a suit after

having obtained an interlocutory injunction, it cannot be on the basis of costs alone but there must also be an order to set aside the interlocutory orders as well as an order for assessment of damages. Further, a case withdrawn after some judicial orders have been made will warrant the matter to be dismissed as opposed to be struck out unless the action becomes academic.

[9] In the instant case, we note that the learned High Court judge had only allowed the withdrawal with costs and without setting aside the interlocutory injunction.

[10] In consequence, we invited parties to submit on these issues and also on the hearing of the appeal on 4 April 2019, we directed parties to submit on two issues:

3.1 Whether the High Court should have stayed the underlying proceedings, including the Respondent's application to discontinue his claim, pending the disposal of the Injunction Appeal?

3.1 If so, can the said order be made by the Court of Appeal at this juncture?

BRIEF FACTS AND GROUNDS

[11] The brief facts and grounds of the case placed in a rudimentary manner before us is repeated to save court's time and it reads as follows:

Brief facts:

1. The plaintiff/respondent/P1 filed this suit claiming for defamation uttered to him by the defendant/appellant/D1. When the case was fixed for trial, P1 made an oral application to withdraw the suit and the notice of withdrawal (sic) was already made known during the case management stage.

2. Previously, the High Court allowed P1's application for injunction against D1 from allowing the streaming of the relevant video pending the disposal of this suit. The decision was affirmed by the Court of Appeal and was (sic) pending appeal before the Federal Court (Injunction Appeal).

3. D1 objected on the withdrawal because the case is on advance stage and had fulfilled the *dominus litis*. P1 should not be allowed to change his course of this case since P1 already opted to continue with the injunction appeal. P1 had benefited from the injunction order.

4. High Court; P1's oral application to withdraw the suit was allowed with no liberty to file afresh. The suit was struck out with costs of RM30,000 to be paid to D1 within 2 weeks.

5. There are 2 Grounds of Judgment provided by the High Court for this matter. The 2nd Grounds of Judgment was the updated version of the 1st Grounds of Judgment.

Grounds of Decision of High Court (Original)

Whether P1's application should be allowed.

6. The court has unfettered discretion to allow withdrawal of suit. D1 is not grievously prejudiced by this application. The suit has not reach *dominus litis* stage for P1 to be forced to continue with the suit. P1 did not get clear benefit by the injunction order. Previously (sic), the court only grant interim injunction in favour of P1 but only to stop the streaming of the video. The withdrawal will be the end of the suit with no liberty to file afresh.

Grounds of Decision of High Court (Updated)

Whether P1's application should be allowed.

7. The main suit is for defamation of the word uttered by D1 outside the parliament against P1 on 6.4.2017. The statement then was uploaded on D1's facebook. In defence, D1 claimed that it was a justification, fair comment and a qualified privilege. After the election result, P1 wished to withdraw the suit. D1 argued that there was (sic) some documents that was classified as confidential being re-opened after the election result and D1 would lose his benefit of the situation. D1 also argued that P1 should be estopped since P1 had opted to proceed with the injunction appeal to the Federal Court. D1 further argued that P1 would get the benefit by restricting D1's freedom of speech. (Some cases were added in this grounds of judgment). P1 is the one who had high interest in this suit. D1 would not be affected by the withdrawal of this suit. P1 should not be forced to continue with this suit. (The rest are the same with the original version).

[12] The memorandum of appeal reads as follows:

1. Yang Arif Hakim Mahkamah Tinggi dalam melaksanakan budibicara ('*discretion*') beliau telah gagal untuk mengambil kira dan/atau gagal untuk mengguna pakai dengan wajarnya prinsip-prinsip undang-undang yang terpakai berkenaan dengan satu permohonan bagi kebenaran untuk pemberhentian ('*discontinuance)* atau penarikbalikan *('withdrawal')* di bawah Aturan 21 Kaedah 3 Kaedah-Kaedah Mahkamah 2012.

2. Khususnya, Yang Arif Hakim Mahkamah Tinggi telah gagal untuk mengambil kira dan/atau mempertimbangkan secara wajarnya faktor-faktor berikut:-

   (i) Prosiding-prosiding di Mahkamah Tinggi telahpun mencapai satu tahap yang matang (*advanced stage)* dan Perayu/Defendan adalah *dominus litis;*

   (ii) Perayu/Defendan telahpun mendapat kebenaran untuk merayu kepada Mahkamah Persekutuan ('*Kebenaran untuk Merayu*') ('*Rayuan tersebut*') terhadap perintah Mahkamah Tinggi bertarikh 4.8.2017 yang telah membenarkan permohonan Responden/Plaintif untuk satu injunksi interim ('*Perintah Injunksi*');

A (iii) Dalam Rayuan tersebut, terdapatnya persoalan-persoalan undang-undang yang telahpun dikenalpasti sebagai penting dan wajar dijawab oleh Mahkamah Persekutuan;

(iv) Pada masa yang matan, Responden/Plaintif telahpun memilih untuk meneruskan dengan pendengaran permohonan Perayu/Defendan bagi kebenaran untuk merayu kepada Mahkamah Persekutuan dan apa-apa rayuan yang timbul sebagai akibatnya, dan bukannya untuk menghentikan atau menarikbalik tindakan beliau;

(v) Pemberhentian atau penarikanbalik tindakan tersebut akan memprejudiskan atau menafikan kelebihan ('*advantage*') yang telah dicapai oleh Perayu/Defendan dalam mendapat Kebenaran untuk Merayu tersebut;

(vi) Sebaliknya, Responden/Plaintif telahpun menikmati kelebihan dan manfaat Perintah Injunksi tersebut sejak 21.4.2017 tanpa perbicaraan penuh, yang mana Perayu/Defendan menegaskan adalah satu halangan yang tidak wajar atas hak perlembagaan beliau kepada kebebasan untuk bersuara;

(vii) Permohonan yang hanya dibuat begitu lewat oleh Responden/ Plaintif untuk menghentikan atau menarikbalik tindakan beliau di sini, adalah satu pergerakan taktikal ('*tactical manouvre*') (sic)*;*

(viii) Oleh demikian, Responden/Plaintif sepatutnya diestop atau dihalang daripada menghentikan atau menarikbalik tindakan di sini.

3. Dalam segala keadaan kes ini, Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dalam membenarkan permohonan Responden/Plaintif dan membenarkan pemberhentian atau penarikanbalik tindakan di sini.

[13] We have read the appeal records and the able submissions of the parties. After much consideration to the submissions of the parties, we take the view that the appeal has merit. Our reasons, inter alia, are as follows:

(a) it is trite the right to withdraw the action rests with the plaintiff with a small window for the court to direct the matter to proceed and also hear the defendant's evidence (see *Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan* [2002] 3 MLJ 155; *Covell Matthews & Partners v French Wools Ltd* [1977] 1 WLR 876; *Castanho v Brown & Root (UK) Ltd and another* [1981] 1 All ER 143). The issue, at the end of the day, will only relate to costs and also issues of damages related to unlawfully securing interlocutory orders. In addition, we must say that in the event the defendant by the conduct of the plaintiff's action has suffered loss and damages, etc; other form of action can be mounted for abuse of process of the court inclusive of action for malicious prosecution. Whether such action will succeed or not will depend on the facts of each case and the gravity of the abuse;

(b) as far as this action is concerned, once the main suit is withdrawn all other applications and interlocutory orders made by the plaintiff or defendant will also collapse. In our view, it is one of common sense related to the rule of law as well as procedure. Stay of proceedings on the facts may not be an appropriate relief purely on the ground that there is an appeal pending in the Federal Court; and

(c) on the issue of whether interim order will be dissolved if the main suit is withdrawn, we are of the view it is deemed to be vacated save that it should be through the order of court and where relevant, the court must order inquiry as to damages when there is a specific undertaking as to damages. Support for the proposition is found in a number of cases cited by the parties herein. It is sufficient for us to quote from *CM Row's Law of Injunctions* (9th Ed, 2013) at p 59, where the learned author observed:

> When a party obtains an interim order and he does not choose a final adjudication and voluntarily withdraws his cause and the final proceedings is dismissed as withdrawn, the interim order automatically stands vacated ... (see *V Ramakrishna v N Sarojini* AIR 1993 AP 147).

[14] We are mindful of the submission of the appellant on the nature of the order they were seeking if this appeal were to be allowed. We must say that a judge does not sit like an arbitrator who receives remuneration from parties to answer all questions raised and give reasons for not doing so. An arbitrator is vested with powers as agreed by the parties and he is not bound by rules of procedure of courts and/or the Evidence Act 1950. The only guideline is, he must not breach rules of natural justice, rules of procedure parties have agreed to and must act in good faith. The jurisprudence related to arbitration is not courts' model, though some judgments appear to have endorsed it.

Our powers in respect of appeal is anchored in s 69 of the Courts of Judicature Act 1964. We have wide discretion to make any form of just orders which ought to have been made whether or not there was submission from parties or there was a particular appeal or cross-appeal, etc. The powers of court and its jurisdiction was explained by the Court of Appeal in the *Kenanga* case (*Kenanga Investment Bank Bhd v Swee Joo Bhd & Ors and another appeal* [2017] MLJU 2095; [2017] 1 LNS 2086), in great detail under the caption of 'micro' and 'macro' jurisprudence. We do not think it is necessary to repeat the same.

[15] After having considered the relevant authorities, we take the view that this is a fit and proper case for the appeal to be allowed and the orders ought to have been made by the High Court are as follows:

(a) plaintiff's action is dismissed with costs; and

(b) interlocutory injunction is set aside with an order for assessment of damages.

A (see s 69 of the CJA 1964).

[16] For reasons stated above, we allow the appeal with costs. The High Court's order is substituted with the orders stated in para 15 above.

B We hereby order so.

Order accordingly.

Reported by Ashok Kumar

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